IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3157 OF 2005

Sajid Basir Shaikh ...Applicant

Vs.

The State of Maharashtra ...Respondent

Shri.Khan Abdul Wahab for the Applicant.
Shri. S.R.Borulkar, Public Prosecutor with
Ms.S.D.Shinde A.P.P. for the Respondent.

CORAM : A. S. OKA, J.
DATE ON WHICH
JUDGMENT IS RESERVED : JUNE 28, 2005.
DATE ON WHICH
JUDGMENT IS PRONOUNCED: JULY 06, 2005.

JUDGMENT :

1. In this Application for Bail under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the said Code'), the Advocate appearing for the Applicant has raised interesting questions.

2. F.I.R. has been registered against the Applicant and other co-accused for the offences punishable under sections 395, 397, 324, 34 of the Indian Penal Code read with sections 3 and 25 of the Arms Act. It is not in dispute that a co-accused was enlarged on bail under the orders of the learned Metropolitan Magistrate. The said co-accused is Dhananjay Shantaram Keer. By order dated 6th October, 2004 the said co-accused was enlarged on compulsory bail under the provisions of sub-section (2) of Section 167 of

the said Code on the ground that the chargesheet was not filed within the period of ninety days. The Applicant herein was arrested on 7th July, 2004 and the said co-accused Dhananjay Keer was arrested on 8th July, 2004. It appears that the Applicant submitted an Application in person on 3rd November, 2004 before the learned Metropolitan Magistrate praying for compulsory bail under sub-section (2) of Section 167 of the said Code. The said Application was rejected on the very day by the learned Magistrate by observing that the chargesheet was filed on 20th October, 2004 and therefore, after filing of the chargesheet the Applicant has no right to apply for mandatory bail. An Application made by the Applicant before the Sessions Court for bail has been rejected by order dated 7th March, 2005.

3. The learned Counsel appearing for the Applicant submitted that though the Application for bail was not moved by the Applicant before the learned Magistrate before filing of the chargesheet, he was entitled to relief of compulsory bail as the learned Magistrate did not perform his obligation of bringing it to the notice of the Applicant that in case he is prepared to furnish bail, he has a right to be enlarged on bail. He submitted that as the Applicant was not made aware about his right to apply for and obtain bail, he could

not apply for the relief before the chargesheet was filed. He submitted that as the Applicant could not apply for compulsory bail only on account of default on the part of the learned Magistrate, even today he is entitled to claim bail under section 167(2) of the said Code. He has placed reliance on various decisions the Apex Court, a reference to which will be made at a later stage. Secondly, he submitted that as co-accused has been enlarged on bail, he is entitled to claim parity. He pointed out that the Accused who has been enlarged on bail has played the major role in the alleged offence of robbery and even according to the prosecution case, the Applicant was only driving the vehicle which was used by the Accused for committing the offence. He, therefore, submitted that the Applicant is entitled to bail on the ground of parity. He submitted that bail granted under section 167(2) of the said Code is a bail granted on merits and therefore, on the basis of such order granting bail, the Applicant is entitled to claim parity.

4. The learned Public Prosecutor Shri. Borulkar submitted that the right to apply for bail under section 167(2) of the said Code gets extinguished when the chargesheet is filed and the Applicant cannot avail of the said right by making application after chargesheet is filed. He submitted that the Applicant

ought to have offerred to furnish bail by making application before the date of filing of chargesheet and as he has failed to do so, he cannot seek bail as a matter of right as his right to be enlarged on compulsory bail is already extinguished. He submitted that the Applicant cannot claim parity as the Applicant has played a major role in the serious offence of robbery. He submitted that the Applicant has criminal antecedents and there are seven offences registered against the Applicant in Mumbai, at Dombivali in District Thane and in District Dhule and therefore, he cannot be enlarged on bail. The learned Public Prosecutor also placed reliance on various decisions.

5. The learned Counsel for the Applicant has placed reliance on decision of the Apex Court reported in **(1994)4 Supreme Court Cases 602 (Hitendra Vishnu Thakur & Ors., Vs. State of Maharashtra & Ors.).** The Apex Court by the said judgment held that the provisions of Section 167(2) of the said Code are applicable to the provisions of TADA Act. In paragraph No.20 of the said decision the Apex Court held that the Accused has an indefeasible right to be enlarged on bail once the police fail to file the chargesheet within the time provided by law. The Apex Court held that an obligation is casted on the court

to inform the accused of his right of being released on bail to enable him to make an application in that behalf. Same is the ratio of the decision of the Apex Court reported in **1980(1) Supreme Court Cases 81 (Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar).** The learned Counsel appearing for the Applicant has placed reliance on one more decision of the Apex Court reported in **2001 ALLMR (Cri.) 713 in the case of Uday Mohanlal Acharya Vs. State of Maharashtra.** The sum and substance of the submissions is that the learned Magistrate ought to have performed his obligation by informing the Applicant of his indefeasible right to apply for bail once period of ninety days had lapsed from the date of arrest within which the police failed to file the chargesheet. The question is whether the Applicant can claim the bail by default even after chargesheet is filed only on the ground that the Magistrate has failed to perform his obligation.

6. In a decision of the Apex Court reported in **(1996) 1 Supreme Court Cases 718 (Dr. Bipin Shantilal Panchal Vs. State of Gujarat)**, the Apex Court held that if the accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the chargesheet within the maximum time allowed by law, he cannot contend that he had an

indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the chargesheet is filed. The Apex Court held that if the Accused exercises his right within a time allowed by law then he cannot be re-arrested on mere filing of the chargesheet. The learned Single Judge of this court in a decision reported in **2004(3) Maharashtra Law Journal, 939 (Hamaja Mohiddin Kutty Vs. State of Maharashtra)** held that once chargesheet is filed, the right to apply for bail under section 167(2) of the said Code is extinguished. In the case of Dr.Bipin Shantilal Panchal (Supra), the Apex Court held thus:

> "Therefore, if an accused person fails to excercise his right to be released on bail for the failure of the prosecution to file the chargesheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it any time notwithstanding the fact that in the meantime the chargesheet is filed".

Thus, the position of law which emerges is the right which accrues in favour of the accused to seek compulsory bail under section 167(2) of the said Code gets extinguished if the accused fails to exercise his right before the prosecution files the chargesheet. There is no provision in the statute which lays down that the right which is extinguished can be revived. There cannot be a dispute about the proposition of the law that

it was an obligation on the part of the learned Magistrate to inform the Applicant of his right to be released on bail under section 167(2) of the said Code. Even assuming that the learned Magistrate has failed to perform his duty, the Applicant cannot exercise the right after filing of the chargesheet as the very act of filing chargesheet has a result of extinguishment of the said right. Hence, the first submission of the learned Counsel for the Applicant deserves to be rejected.

7. Learned Single Judge of this Court in a judgment reported in **1999(3) Maharashtra Law Journal, 227 (Bhulabai Barkaji Matre Vs. Shankar Barkaji Matre)** held that bail granted on merits and bail granted in default as contemplated under section 167(2) of the said Code is one and the same and therefore, bail granted under section 167(2) of the said Code can be cancelled in exercise of powers under sections 437(5) and 439(2) of the said Code. The Apex Court in a decision in the case of Aslam Babulal Desai(Supra) held that the bail granted in default under the proviso to section 167(2) is no different from the bail granted on merits either under section 437 or 439 of the said Code. The

Apex Court in another decision reported in **(1994)3 Supreme Court Cases 440 (Directorate of Enforcement Vs. Deepak Mahajan & Anr.)** held that once the accused is released on compulsory bail, he shall be deemed to be so released under chapter XXXIII of the said Code. Thus, the law seems to be that there is no difference between the bail granted on merits and the bail granted in default.

8. In view of this position,the case of the Applicant will have to be examined on merits. F.I.R. has been registered on the basis of the complaint by one Prakash Waman Patil. He stated that he is working as a peon in a Company. The Company is having four different offices in Mumbai. The Company deals in business of Foreign Exchange. He stated that at the relevant time he was doing duty at Sahar International Airport at Mumbai where the office of the said Company is located. His duty was to collect the foreign exchange and Indian Currency collected in the office and to deposit the same in the Main Office in Fort Area in Mumbai. The case is that on 6th May, 2004 he took Indian and Foreign currency alongwith his colleague Vishal Surve in a Maruti Van. Currency notes were kept in alluminium bag

which was kept below the seat on the rear side of the Maruti Van. At about 08.45 a.m., the car was stopped near the Grand Inter-Continental Hotel by a red coloured Maruti 800 Car. After said Maruti Car stopped in front of the said Maruti Van, three persons got down from the said Car. Out of them two were possessing choppers in their hand and one of them was possessing revolver. Threatening the colleague of the Complainant Vishal Surve by a revolver, the said person took away a leather bag containing foreign currency from the said Vishal Surve and by threatening the Complainant the said accused took away bag containing Indian currency. By threatening the driver of the Maruti Van by showing a chopper, one of the accused took away the cell phone of the driver and threw away the key of the car. At that time, the driver of the red Maruti Car got down and prevented the complainant from getting down from the Maruti Van. Other accused fired a shot of revolver and the accused left the scene by sitting in the Maruti Car. In the complaint, the complainant gave description of the accused. Test Identification Parade was conducted by the police. In the said Test Identification Parade the complainant identified the applicant herein as the driver of the Maruti Car. He identified

the other accused Dhananjay Keer as the person who snatched the bag from Vishal Surve containing foreign currency. The third person who was present alongwith the complainant also identified the applicant as driver of the Maruti Van and Dhananjay Keer as the person who snatched the bag containing foreign exchange from Vishal Surve.

9. Thus, the role ascribed to the Applicant is that he was driving the vehicle which was used in the offence and he prevented the complainant from getting down from the Maruti Van. The co-accused who is enlarged on bail has played a major role. By threatening Vishal Surve by using a revolver, he snatched the bag from Vishal Surve which contained valuable foreign currency.

10. The learned A.P.P. has stated that there are three cases registered against the Applicant in the year 2004 at Dharavi Police Station, Mumbai, Mahim Police Station and Ram Nagar Police Station, Dombivali for committing offence punishable under section 379 of the Indian Penal Code. There is one offence registered against the Applicant at Songir Phata Police Station, District Dhule for committing offence under section 395 of the Indian Penal Code. There are

two offences registered against the Applicant at Chembur Police Station and in the office of the Deputy Commissioner Police, C.I.D., alleging commission of offences under section 392 and 394 of the Indian Penal Code and there is one more L.A.C. case registered against the Applicant under sections 3 and 25 of the Arms Act.

11. It is not in dispute that in the case under the Arms Act, the Applicant has been already enlarged on bail and in the case registered at Chembur Polce Station, the Applicant has already been acquitted. So far as the case registered at Songir Phata Police Station is concerned, the Applicant has not been arrested.

12. The Applicant is in custody from 7th July, 2004. The trial of the offence is not likely to conclude in near future. As stated earlier, co-accused who has allegedly played a major role in the offence of robbery has been enlarged on bail. In such circumstances, a case is made out for enlarging the accused on bail by imposing stringent conditions. One of the said stringent conditions is that till the conclusion of the trial, the Applicant shall not enter the city of Mumbai, city of Dombivli and area falling within

the jurisdiction of Songir Phata Police Station, District Dhule. Hence, I pass the following order:

: O R D E R :

i) The Applicant shall be enlarged on bail in connection with C.R. No. 188 of 2004 of Sahar Police Station, subject to furnishing a personal bond of Rs.25,000/- with two local sureties in the like amount.

ii) The Bail is granted subject to condition that the Applicant shall not enter the city of Mumbai, city of Dombivli in District Thane and area falling within the jurisdiction of Songiri Phata Police Station, District Dhule till the conclusion of the trial without prior permission of the learned Sessions Judge. It is made clear that the Applicant will be entitled to enter the city of Mumbai only for the purposes of attending to the dates fixed in the case.

iii) The Bail is granted subject to condition that the Applicant shall not directly or indirectly make any inducement or threat to any prosecution witnesses and shall not in any manner tamper with the prosecution evidence.

iv) The Applicant shall co-operate with the learned Trial Judge for expeditious disposal of the trial. Any attempt by the Applicant to delay the trial may be a ground for cancellation of bail.

v) Any observation made in this order shall not be construed as any finding or any expression of opinion on the merits of the case at the time of trial.

vi) Application is disposed of in the above terms.

vii) The parties to act upon an authenticated copy of this order.

JUDGE